# The Real Problem with Daubert
# Colorado Springs
# September 4, 2008

- Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)
- Judicial Recognition of “Junk Science” or the Success of Manufacturers and Others
- The Rejection of Frye v. US, 293 F. 1013 (1923)
- The Beginning of a New Order

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# Sunday, July 13, 2008

- Bendectin – Morning Sickness Drug
- 130,000 Patients Studied
- None Found Bendectin To Be Capable of Causing Malformations in Fetuses
- Eight Experts for Plaintiffs Relied on In Vitro (Test Tube) and In Vivo (Live Animal) Studies and a Reanalysis

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# Sunday, July 13, 2008

- D. Ct. Granted Summary Judgment Using Frye
- C.A. Affirmed
- S. Ct. Vacates and Remands
- Court Rejects Frye and Properly Concludes FRE Adopts a Liberal Approach to Admissibility and to Opinion Evidence

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# Sunday, July 13, 2008

- But, Court Says There are Limits to "Purportedly Scientific Evidence"
- FRE 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

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- " '[S]cientific' implies a grounding in the methods and procedures of science."
- " '[K]nowledge' connotes more than subjective belief or unsupported speculation."

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- Scientific Knowledge =s Evidentiary Reliability
- Assist the Trial of Fact =s Relevance
- Relaxing Personal Knowledge Requirement "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline."

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- Judge Makes a 104 (a) Ruling
- "[A] key question to be answered in determining whether a theory or technique is scientific knowledge is whether it can be (and has been) tested."
- "Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication"
  - Some innovative theories have not been published
  - Some are of too limited interest

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- "[T]he court ordinarily should consider the known or potential rate of error."
- " '[G]eneral acceptance' can yet have a bearing on the inquiry."
- "The focus, of course, must be solely on the principles and methodology, not on the conclusions that they generate."

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- Defendants Assert that Abandonment of Frye “will result in a ‘free for all’ in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions.”
- Response: “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”

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- Plaintiffs Complain that “recognition of a screening role for the judge that allows for the exclusion of ‘invalid’ evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth.”
- Response: “We recognize that, in practice, a gatekeeping role for the judge , no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by the Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.”

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- Chief Justice Rehnquist, joined by Justice Stevens, concurs in part and dissents in part.
- "I do not doubt that Rule 702 confides in the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role."

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- The First Problem: What is the Relationship Between “Relevance” Under Daubert and FRE 401: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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- If FRE 401 and FRE 402 (All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.) Already Exclude Irrelevant Evidence, What Does Daubert Add?

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- Second Problem: What Does it Mean in the Context of Litigation to be Tested?
- E.g., One Could Retest the Studies Relied Upon, and Would Presumably Get the Same Results
- E.g. One Could Do Another Reanalysis and Presumably Get Same Results
- When Are In Vitro and Animal Studies "Relevant"?
  - What if Scientists Reasonably Disagree?

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- How Relevant Is Peer Review and Publication to the Types of Opinions that Are Offered in Court?
- What Weight to a Peer Reviewed or Published Study?
  - What Happens if there is Contrary View?

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- How Can One Determine the Error Rate for Judgments and Opinions?
  - No Answer for This One
- What is General Acceptance?
  - Back to the Old Frye Questions
  - What % of Experts in a Field?

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- Biggest Problem: What is Reliability?
- What Defects or Problems are Sufficient to Make an Opinion Unreliable?
- A Judge Under Rule 104 (a) is a Fact Finder
  - What "Facts" Are to Be Found?

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- The Court Ignored FRE 803 (6): A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, **opinions, or diagnoses**, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and **if it was the regular practice of that business activity** to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, * * * **unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.** The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

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- 803 (6) Requires Only that a Regularly Conducted Activity Be Shown and Opinions are Admissible
- Burden is Shifted to Opponent to Show Circumstances that Challenge Trustworthiness

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- Court Mentions FRE 403 Suggesting that It Supports More Control Over Experts Than Over Lay Witnesses
- But the Rule (Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.) Does Not Say That and Clearly Favors Admissibility

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- Court Ignores FRE 803 (4): Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- Rule Expands Common Law and Trusts Juries

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- Court Ignores FRE 803 (18): To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.
- Doesn't This Suggest that Treatises That Some Experts Regard as Reliable Should be Admitted (Read)?

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- As a Result, a Trial Judge is In Fact the Arbiter of Good and Bad Science and is Permitted to Reject Evidence that Reasonable Experts Routinely Rely Upon
- No Finding is Needed that Juries Could Not Understand Conflicting Testimony and Judge For Themselves Which Is More Persuasive

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- General Electric Co. v. Joiner, 522 U.S. 136 (1997)
- Joiner Claimed that Exposure to PCBs "Promoted" His Lung Cancer
  - He Had Been a Smoker
- D. Ct. Granted Summary Judgment
- C.A. Reversed– Said FRE Display a Preference for Admissibility and a Particular Stringent Standard of Review Applies to Exclusion of Expert Testimony

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- S. Ct : (1) Abuse of Discretion in Standard of Review; (2) Just Because Exclusion is "Outcome Determinative" Does not Require More Searching Review
- C.J. Rehnquist Writes for Court
- "The issue was whether these experts' opinions were sufficiently supported by the animal studies on which they purported to rely."
  - What is sufficient support?
- "[C]onclusions and methodology are not entirely distinct from one another."

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- "A court may conclude that there is simply too great an analytical gap between the data and the opinion offered?
  - Is this a legal judgment?
  - How much of a gap is too much?
- Justice Breyer Concurs: Judges Must be Gatekeepers and May Need Help
- Real Question: Why Shouldn't It Matter that an Evidentiary Ruling is "Outcome Determinative"?
- Isn't That Something a Judge Should Consider in Exercising Discretion?
- After All, Exclusion Ends the Case, While Admission Leaves the Decision to the Jury

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- Kumho Tire Company Ltd. v. Carmichael, 526 U.S. 137 (1999)
- Tire Blow Out; Severe Accident
- D. Ct. Granted Summary Judgment
- C.A. Reversed
- S. Ct. Reversed C.A.

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- Justice Breyer's Opinion: (1) Daubert Applies to all Expert Testimony; (2) Trial Judge May Consider Daubert Factors as Well as Others; Judge Has as Much Discretion to Decide How to Determine Reliability as to Making the Reliability Determination

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- Full Circle: The Appellate Review Standard is Abuse of Discretion
- The Trial Judge Standard is Discretion
  - What Happened to 104 (a)?
- "In sum, Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case."

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- Expert Should Use Same Level of Intellectual Vigor In Courtroom as Outside
  - If He/She Does, What Isn't This Enough?
- Justice Scalia, joined by Justices O'Connor and Thomas: "[T]rial court discretion . . . Is not discretion to abandon the gatekeeping function."

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- FRE 702 Now: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon ***sufficient facts or data***, (2) ***the testimony is the product of reliable principles and methods***, and (3) ***the witness has applied the principles and methods reliably to the facts of the case***.

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- Advisory Committee Note to 2000 Amendment: "When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise."
- But the Trial Judge Has Discretion to Exclude

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- But, the most important question of all ought to be this: When dealing with expert testimony, why should we permit some judges to exclude testimony that other judges might admit as reliable when the effect is to prevent a litigant from having a trial? Having alluded to the irony earlier, I return to it explicitly now. There is something bizarre about telling trial judges that they may exclude expert testimony when they are not certain that it is unreliable and should never be admitted in a federal trial. If a judge says to himself or herself, “this is a close call,” what justification is there for calling for exclusion rather than admitting the evidence so that it can be fully explored at trial?

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- What Should the Showing Be?
- (1) Field is Reliable
  - Astrologists' Testimony Versus Astronomist's
- (2) Expert Uses Methods or Techniques Used Outside of Court
- (3) Others in Field Accept These as Reliable
- (4) Expert's Opinion Fits the Facts